

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Physical Security Reliability Standard)

Docket No. RM14-15-000

**COMMENTS OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

The North American Electric Reliability Corporation (“NERC”) hereby provides comments on the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) Notice of Proposed Rulemaking (“NOPR”) proposing to approve Reliability Standard CIP-014-1 – Physical Security.¹ The purpose of proposed Reliability Standard CIP-014-1 is to enhance physical security measures for the most critical Bulk-Power System facilities and thereby lessen the overall vulnerability of the Bulk-Power System to physical attacks. Reliability Standard CIP-014-1 continues NERC’s longstanding efforts to provide for the reliability and security of the Bulk-Power System in North America. NERC supports the Commission’s proposal to approve the proposed Reliability Standard and provides the following comments on the NOPR.

I. BACKGROUND

On March 7, 2014, the Commission issued an order directing NERC to develop one or more Reliability Standards, within 90 days of the order, to address physical security risks and vulnerabilities of critical facilities on the Bulk-Power System.² On May 23, 2014, in response to the March 7 Order, NERC petitioned the Commission to approve proposed Reliability Standard CIP-014-1.³ As discussed in detail in the Petition, proposed Reliability Standard CIP-014-1

¹ *Physical Security Reliability Standard*, 148 FERC ¶ 61,040 (2014).

² *Reliability Standards for Physical Security Measures*, 146 FERC ¶ 61,166 (2014) (the “March 7 Order”).

³ *Petition of the North American Electric Reliability Corporation for Approval of Proposed Reliability Standard CIP-014-1*, Docket No. RM14-15-000 (May 23, 2014) (the “Petition”).

requires applicable owners and operators of the Bulk-Power System to take steps to protect “Transmission stations and Transmission substations, and their associated primary control centers that if rendered inoperable or damaged as a result of a physical attack could result in widespread instability, uncontrolled separation, or Cascading within an Interconnection.”

On July 17, 2014, the Commission proposed to approve Reliability Standard CIP-014-1 and, as discussed further below, requested comments on the following issues:

- *Applicable Government Authority’s Ability to Add or Subtract Critical Facilities.* The Commission proposes to direct NERC to modify proposed Reliability Standard CIP-014-1 to include a provision that would allow applicable governmental authorities to add or subtract facilities from an applicable entity’s list of critical facilities.⁴
- *Standard for Identifying Critical Facilities.* The Commission proposes to direct NERC to remove the term “widespread” from the proposed Reliability Standard.⁵
- *Protection of “High Impact” Control Centers.* The Commission proposes to direct NERC to submit an informational filing indicating whether the development of Reliability Standards that provide physical security for all “High Impact” control centers, as that term is defined in Reliability Standard CIP-002-5.1, is necessary for the reliable operation of the Bulk-Power System.⁶
- *Applicability to Generator Owners and Generator Operators.* The Commission proposes to approve the applicability section of the proposed Reliability Standard without the inclusion of Generator Owners and Generator Operators.⁷
- *Third-Party Recommendations.* The Commission proposes to approve the framework for addressing the recommendations of a third-party that conducts a verification or review pursuant to Requirements R2 or R6 of Reliability Standard CIP-014-1.⁸
- *Resiliency.* The Commission proposes to direct NERC to submit an informational filing that addresses the resiliency of the Bulk-Power System when confronted with the loss of critical facilities.⁹

⁴ NOPR at PP 20-24.

⁵ *Id.* at PP 25-29.

⁶ *Id.* at PP 30-40.

⁷ *Id.* at PP 41-45.

⁸ *Id.* at PP 46-51.

⁹ *Id.* at PP 52-57.

II. COMMENTS

As stated above, NERC supports the Commission's proposal to approve Reliability Standard CIP-014-1. Consistent with the March 7 Order and as discussed in the Petition, proposed Reliability Standard CIP-014-1 represents a significant step forward in securing North America's most critical Bulk-Power System facilities and will bolster NERC's and the industry's ongoing efforts to provide for a secure and reliable Bulk-Power System. The proposed Reliability Standard will improve reliability by helping to ensure that owners and operators of the Bulk-Power System implement the security and resiliency measures necessary to protect critical facilities from physical attacks. NERC provides the following comments on the issues discussed in the NOPR:

1. Applicable Government Authority's Ability to Add or Subtract Facilities from an Entity's List of Critical Facilities

a. NOPR

In the NOPR, the Commission proposes to direct NERC to develop a modification to the proposed Reliability Standard to include a procedure that would allow applicable governmental authorities (i.e., the Commission and any other appropriate federal or provincial authorities) to add or subtract facilities from an applicable entity's list of critical facilities.¹⁰ The Commission stated that NERC's proposal did not directly satisfy the directive in the March 7 Order to include such a procedure for the Commission or provide an equally efficient or effective alternative to that directive.¹¹

In its Petition, NERC explained that the proposed Reliability Standard does not include an explicit procedure for the Commission to add or subtract a facility from a Transmission Owner's list of critical facilities because the Commission has existing, broad authority to enforce NERC

¹⁰ NOPR at PP 22-24.

¹¹ *Id.* at PP 22-23.

Reliability Standards pursuant to Section 215(e)(3) of the Federal Power Act (“FPA”) and Section 39.7(f) of the Commission’s regulations and, in turn, can effectively require an applicable entity to modify its critical facilities list in an event of non-compliance with Requirement R1.¹² The Commission agreed in the NOPR that an applicable entity’s failure to develop an adequate list of critical facilities consistent with Requirement R1, even if a third-party verifies the list under Requirement R2, constitutes non-compliance with Requirement R1 and could subject the applicable entity to compliance or enforcement actions to compel an entity to modify its critical facility list. The Commission asserted, however, that “there is no guarantee that would happen in a timely manner, if at all.”¹³ On this basis, the Commission stated that NERC’s proposal did not provide an equally efficient or effective alternative to the directive in the March 7 Order and proposed to direct NERC to modify the proposed physical security Reliability Standard to include a procedure that would explicitly allow applicable governmental authorities to add or subtract facilities from an applicable entity’s critical facility list.

b. Comments

NERC respectfully requests that the Commission not issue the proposed directive in the final rule in this proceeding. As discussed below, the proposed directive is unnecessary and unsubstantiated. In the alternative, if the Commission continues to maintain that the proposed directive is necessary and within the scope of its FPA Section 215 authority, the Commission must, in the final rule: (1) explain the basis for and the concerns underlying the proposed directive to ensure that NERC, together with its stakeholders, can effectively consider the proposed directive through its standards development process, consistent with the framework established in Section

¹² Petition at 37.

¹³ NOPR at P 23.

215 of the FPA and Commission precedent; and (2) limit and clarify the scope and content of the proposed directive, as discussed below.

i. The Proposed Directive is Unnecessary and Unsubstantiated As It Duplicates Existing Commission Authority

As discussed in the Petition, the Commission's existing compliance and enforcement authority provides the Commission broad powers to compel an entity to modify its critical facility list, including establishing a specific deadline for remediation.¹⁴ In short, the proposed Reliability Standard and its associated implementation plan are designed to require applicable entities to identify and protect their critical assets as soon as reasonably practicable, balancing the urgency of protecting the Bulk-Power System from harm while providing those entities adequate time to meaningfully implement the requirements. As explained in the Petition, should an entity fail to: (1) perform its initial or subsequent risk assessments in a timely manner; or (2) demonstrate that its method for performing its risk assessments under Requirement R1 was technically sound and reasonably designed to identify all of its critical facilities, NERC, a Regional Entity, and the Commission, through their compliance monitoring and enforcement activities, have the authority to compel the applicable entity to identify the appropriate facilities in a timely manner or face penalties and other sanctions under the FPA.¹⁵

As noted above, the Commission does not dispute that NERC, a Regional Entity, or the Commission can use their compliance and enforcement authority to compel an applicable

¹⁴ Petition at 37.

¹⁵ Specifically, Section 215(e)(3) of the Federal Power Act provides:

On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

Transmission Owner to modify its critical facility list or be subject to penalties and sanctions under the FPA. It is thus unclear what the proposed procedure would accomplish that the Commission cannot already achieve using its existing compliance authority. The Commission has not sufficiently articulated why, after an applicable entity performs its risk assessment under Requirement R1 and has that assessment verified by an independent third-party under Requirement R2, there is an additional reliability need to include a separate procedure in Reliability Standard CIP-014-1 for the Commission to modify the applicable entity's critical facility list, particularly in light of the Commission's existing FPA Section 215 authority to enforce NERC's Reliability Standards.¹⁶

The Commission attempts to justify its proposed directive by stating, without further explanation, that “[while NERC appears to expect that correcting and re-performing the assessment would result in the applicable entity adding to its critical facilities list the previously omitted facility or facilities that the Commission thought critical, there is no guarantee that would happen in a timely manner, if at all.”¹⁷ The Commission, however, does not expound on this concern, failing to (1) substantiate why the Commission cannot use its broad compliance and enforcement authority to modify an applicable entity's critical facility list in a timely manner, or (2) explain why any proposed procedure included in Reliability Standard CIP-014-1 would be any more timely or effective.

As discussed below, the Commission's concern regarding timeliness is unfounded. First, any potential concern related to the need to identify a facility as critical under the proposed

¹⁶ In the March 7 Order, the Commission also did not explain why the proposed directive was necessary for improving reliability given (1) the requirement to include an independent third-party verification of the identification of critical facilities, and (2) the ERO's and the Commission's existing statutory authority to enforce NERC Reliability Standards.

¹⁷ NOPR at P 23.

Reliability Standards to respond to or mitigate a time-sensitive or imminent threat to that facility is misplaced. Consistent with the March 7 Order, the identification of a critical facility pursuant to the proposed Reliability Standard is based on a technical analysis regarding the nature and characteristics of that facility in relation to the facility's impact to the Bulk-Power System if damaged or rendered inoperable as a result of a physical attack, not an actual threat to the facility, imminent or otherwise. The identification of a critical facility under the proposed Reliability Standard (1) simply recognizes that the facility, if damaged or rendered inoperable as a result of a physical attack, could have a critical impact on the Bulk-Power System through instability, uncontrolled separation, or Cascading within an Interconnection, and (2) triggers a 120-day period for the applicable entity to evaluate the threats and vulnerabilities to that facility and develop a security plan to protect that facility.

If there is an imminent threat to a facility that a Transmission Owner erroneously failed to identify as critical pursuant to its Requirement R1 risk assessment, the addition of the facility on the Transmission Owner's critical facility list, by an applicable government authority or otherwise, would not necessarily help to mitigate the imminent threat, it would only trigger the 120-day period under the proposed Reliability Standard. To address an imminent threat to a critical facility that a Transmission Owner failed to identify as critical, or any other facility subject to a security threat, NERC would use its other reliability tools, such as issuing an alert through the Electricity Sector Information Sharing and Analysis Center ("ES-ISAC"), to inform relevant industry participants of the threat and advise industry participants of the essential actions they should take to help mitigate the threat.¹⁸ As explained in the Petition, the proposed Reliability Standard is one of several tools that NERC would use to address the dynamic issues of physical and cyber security.

¹⁸ Pursuant to Section 810 of the NERC's Rules of Procedure, NERC may issue alerts, in the form of specific operations or equipment Advisories (Level 1 Alerts), Recommendations (Level 2 Alerts), or Essential Actions

If the Commission's concern regarding timeliness is rooted in the general need to identify and protect critical facilities as soon as reasonably practical, the Commission has failed to substantiate why that need cannot be met through its existing compliance and enforcement authority. The Commission asserts that using its compliance and enforcement authority may not result in the addition or subtraction of a facility in a timely manner based on the statement in the Petition that if NERC, a Regional Entity or the Commission finds an instance of non-compliance with Requirement R1, they could use their compliance and enforcement authority to compel Transmission Owners to re-perform the risk assessment using assumptions designed to identify the appropriate critical facilities.¹⁹ The Commission does not explain, however, why the Commission cannot compel the applicable entity to re-perform the risk assessment within a reasonable timeframe (i.e., to meet a specific deadline). In fact, the actual performance of a transmission analysis (i.e., running the model) is not a time consuming activity once the assumptions and parameters underlying the analysis are established. Given that the Commission would not have to recreate the entire study but merely modify or correct the assumptions or parameters underlying the Transmission Owner's study, the Commission can use its broad enforcement authority to make certain that the applicable entity re-performs the risk assessment on whatever timeline the Commission deems appropriate or face penalties or sanctions under the FPA.

Moreover, requiring an entity to correct and repeat the Requirement R1 risk assessment is not the only mechanism for enforcing the proposed Reliability Standard. The Petition only

(Level 3 Alerts), to industry to raise awareness of issues on the Bulk-Power System and recommend appropriate action. If, for example, NERC, through the ES-ISAC or otherwise, learns of an imminent threat to any facility from industry participants or applicable governmental authorities, it could issue an Essential Action alert to inform relevant industry participants of essential actions they should take to mitigate the threat and ensure the security and reliability of the Bulk-Power System.

¹⁹ NOPR at P 23.

described one way that NERC, the Regional Entities, or the Commission may exercise their compliance and enforcement authority to modify an applicable entity's critical facility list. If the Commission finds that the entity did not comply with Requirement R1 and omitted one or more critical facilities, nothing requires the Commission to instruct the entity to correct and re-perform the risk assessment if the Commission believes that doing so would be untimely. The Commission has the authority to use other compliance and enforcement approaches for compelling an entity to modify its critical facility list in a timely manner. For instance, if the Commission finds that an applicable entity failed to properly identify critical facilities under Requirement R1, the Commission could issue a directive to the applicable entity, similar to Remedial Action Directives issued by the Electric Reliability Organization ("ERO"), requiring the applicable entity to modify its critical facility list to comply with the proposed Reliability Standard and protect the reliability of the Bulk-Power System, or face sanctions under Section 215 of the FPA.²⁰

Additionally, there is no guarantee that including a procedure for applicable governmental authorities to modify an applicable entity's critical facility list would be any more expeditious than instructing the entity to re-perform the analysis or using other compliance and enforcement approaches to require applicable entities to modify their critical facility lists. In fact, it could take more time. If the Commission seeks to modify a Transmission Owner's critical facility list, the Commission must, consistent with the requirements of the Administrative Procedure Act, articulate a rational explanation for its actions and create a record to justify the addition or subtraction of a facility based on the criteria in the proposed Reliability Standard and the March 7

²⁰ As defined in Section 1.1.27 of NERC's Uniform Compliance Monitoring and Enforcement Program ("CMEP"), Appendix 4C to the NERC Rules of Procedure, a Remedial Action Directive is "[a]n action (other than a Penalty or sanction) required by a Compliance Enforcement Authority that (1) is to bring a Registered Entity into compliance with a Reliability Standard or to avoid a Reliability Standard violation, and (2) is immediately necessary to protect the reliability of the Bulk Power System from an imminent or actual threat." Section 7 of the NERC CMEP provides the procedure for the ERO to issue a Remedial Action Directive to a registered entity.

Order.²¹ This obligation is present regardless of whether the Commission exercises its Section 215 compliance and enforcement authority or whether there is a procedure in the Reliability Standard specifically allowing the Commission to modify an applicable entity's critical facility list. If there is such a procedure in the proposed Reliability Standard, however, the Commission would be obligated to follow that procedure and would lose the flexibility inherent in its compliance and enforcement authority to evaluate, on a case-by-case basis, the appropriate procedure to satisfy its statutory obligations and ensure a timely outcome.²²

The Commission thus needs to consider whether it is prudent to limit the scope of its authority to a NERC Reliability Standard when it already has the discretion to exercise its existing compliance and enforcement authority in a manner that best suits its needs in a particular case. FERC's has broad enforcement authority over NERC's Reliability Standards originating from Congress and defined by its own rules and regulations. It is thus unnecessary to prescribe the Commission's authority to modify a critical facility list in a NERC Reliability Standard, which is subject to stakeholder approval, and unclear why the Commission is seeking to undertake a new role within a Reliability Standard.

²¹ 5 U.S.C. § 706(2)(A). The Administrative Procedure Act requires the Commission to articulate a rational explanation for its actions and it is a well-established principle in administrative law that an agency must engage in reasoned decision-making. See *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (concluding with respect to the evolution of administrative law doctrine that "reasoned decision-making remains a requirement of our law"). Reasoned decision-making necessarily requires that the agency supply a reasoned analysis for its conclusions, and consider the applicable legal authority, including the agency's own regulations, and relevant facts. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). More specifically, a federal agency must be able to trace a path that led it from its statutory authority and the facts to its ultimate conclusion. See *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 142 (D.C. Cir. 1989).

²² Section 215 only requires that the Commission provide notice and opportunity for hearing. As the Commission is aware, the Commission has wide discretion as to the type of notice and hearing it must provide to fulfil its statutory obligations. *Environmental Action v. FERC*, 996 F.2d 401 (D.C. Cir. 1993); *Cities of Carlisle and Neola v. FERC*, 741 F.2d 64 at 431 (D.C. Cir. 1982); *Cities of Batavia v. FERC*, 672 F.2d 64 at 91 (D.C. Cir. 1981); *Kansas Power and Light Co. v. FERC*, 851 F.2d 1479, 1484 (D.C. Cir. 1988).

ii. In the Alternative, the Final Rule Must Justify the Basis for and the Concerns Underlying the Proposed Directive

While NERC does not agree that the proposed directive is warranted, if, after considering the comments on the NOPR, the Commission continues to assert that it is necessary to include a procedure in the proposed Reliability Standard for the Commission to modify an applicable entity's critical facility list, the Commission must, in the final rule, explain the basis for and the concerns underlying the proposed directive to ensure that NERC can effectively consider the proposed directive through NERC's standards development process, consistent with the framework established in Section 215 of the FPA and Commission precedent.²³

Neither the March 7 Order nor the NOPR articulate the basis for the proposed directive. The Commission did not: (i) discuss the Commission's authority under FPA Section 215 to undertake such a role within a NERC Reliability Standard; (ii) explain the reliability need for the proposed directive given the Commission's broad powers to enforce NERC's Reliability Standards, or (iii) substantiate the Commission's concerns regarding its ability to exercise its compliance and enforcement authority in a timely manner. As a result, NERC respectfully submits that, as set forth in the NOPR, the proposed directive is inconsistent with prior Commission precedent. As the Commission acknowledged in Order No. 693, when issuing a directive under Section 215, "it is important that the Commission provide sufficient guidance so that the ERO has

²³ Under FPA Section 215, the Commission has the authority to: (i) approve a proposed Reliability Standard; (ii) remand a proposed Reliability Standard; and (iii) order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out Section 215. 16 U.S.C. § 824o(d). The Commission does not have the authority under Section 215 to draft Reliability Standards, dictate a specific outcome in a Reliability Standard, or change specific language in a Reliability Standard. Section 215 explicitly provides that authority to the ERO. As acknowledged by the Commission in Order No. 693, any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC's standard development process. *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 at P 187 (2007) ("Order No. 693"), *reh'g denied*, 120 FERC ¶ 61,053 (2007) ("Order No. 693-A").

an understanding of the Commission’s concerns and an appropriate, but not necessarily exclusive, outcome to address those concerns.”²⁴

Without additional information and rationale regarding the justification for the proposed directive, NERC cannot effectively consider or address equivalent alternative approaches that stakeholders may present during the standard development process. Accordingly, NERC respectfully requests that the final rule in the proceeding provide NERC additional justification for the proposed directive and further explanation of the reliability concerns prompting the need for the proposed directive, particularly in light of the Commission’s broad powers to enforce the proposed Reliability Standard.

iii. *The Commission Should Also Limit and Clarify the Scope and Content of the Proposed Directive*

In addition to providing additional information and rationale for the proposed directive, if the Commission continues to assert that it is necessary to include a procedure in the proposed Reliability Standard for governmental authorities to modify an applicable entity’s critical facility list, NERC requests, as discussed further below, that the final rule limit and clarify the proposed directive in the following respects:

- only direct NERC to include a procedure for the Commission to add a facility, not to also include a procedure for subtracting a facility;
- specify that the ability of the Commission to add facilities is based on the criteria in the March 7 Order for what constitutes a critical facility;
- clarify the demonstration that the Commission must provide to support the addition of a facility; and
- limit the directive, consistent with the March 7 Order, to including a procedure applicable solely to the Commission for entities and facilities subject to the Commission’s jurisdiction.

²⁴ Order No. 693 at P 185.

NERC respectfully submits that the Commission should limit any directive to including a procedure to add a facility to an applicable entity's critical facility, not to also include a procedure for allowing the Commission to subtract a facility. Including a procedure for subtracting facilities may increase the risk that certain critical facilities would not be protected pursuant to the proposed Reliability Standard. Bulk-Power System owners and operators are typically in the best position to understand the nature of their systems and identify which of their facilities are critical. If a Transmission Owner concludes that a particular facility is critical under Requirement R1, and a qualified and independent third-party verifies that conclusion pursuant to Requirement R2, NERC, the Regional Entities, and applicable governmental authorities should defer to that assessment.

While the criteria in the proposed Reliability Standard for identifying critical facilities is designed to ensure that applicable entities focus their efforts on the highest priority Bulk-Power System facilities, there is a greater risk to reliability if an applicable entity's critical facility list is under-inclusive. If an applicable entity deems a facility to be critical, it could create additional risk to the Bulk-Power System if the Commission can simply supplant the judgment of the applicable entity, as well as the third-party verifier, and require that the applicable entity remove a facility from the critical facility list.²⁵ While applicable entities may voluntarily choose to continue protecting that facility, the ERO and the Commission would lose their compliance monitoring oversight over such protections.

Further, in issuing any directive on this issue, NERC respectfully requests that the Commission clarify in the final rule the circumstances under which the Commission may add a facility. Specifically, the Commission should clarify that the purpose of the procedure is limited

²⁵ The Commission should consider whether it would be prudent to remove a facility from an applicable critical facility and assume the risk that the facility could later be subject to a physical attack that has critical impact on the reliability of the Bulk-Power System.

to identifying those facilities defined as “critical” in the March 7 Order and the proposed Reliability Standard. The Commission should not have the authority to expand the scope of the proposed Reliability Standard by adding facilities for reasons other than those set forth in the March 7 Order and the proposed Reliability Standard. As discussed in the March 7 Order and the Petition, the proposed Reliability Standard is designed to protect the most critical facilities on the Bulk-Power System based on a transmission analysis of whether a facility, if damaged or rendered inoperable, could result in instability, uncontrolled separation, or Cascading within an Interconnection if damaged or rendered inoperable. If the Commission were to expand the scope of the proposed Reliability Standard beyond that criteria, it would be inconsistent with the framework established by FPA Section 215 as it would essentially allow the Commission to modify the scope of a Reliability Standard outside of the ERO’s standards development process. Accordingly, any proposed procedure must be tailored to only allow the Commission an opportunity to add a facility based on a technical analysis of a facility’s criticality to the Bulk-Power System, as defined in the March 7 Order, by either demonstrating a flaw in the applicable entity’s transmission analysis or working with the applicable entity to develop an analysis that is superior to the analysis performed by the applicable entity.

Additionally, the Commission should clarify the type of demonstration that the Commission must provide to justify the addition of a facility. As noted above, given the knowledge of their systems, Bulk-Power System owners and operators are in the best position, working with a third-party verifier, to determine which of their facilities could have the critical impacts described in the March 7 Order. Consistent with the dictates of the FPA and the Administrative Procedure Act to engage in reasoned decision-making, the Commission cannot override the judgment of an applicable entity absent a rational explanation for its actions. The

Commission must technically justify to the applicable entity any addition by either demonstrating a flaw in the applicable entity's transmission analysis or working with the applicable entity to develop an analysis that is superior to the analysis performed by the applicable entity. The Commission should clarify in the final rule that, consistent with Section 215 of the FPA, NERC shall develop the parameters for the demonstration that the Commission must make before an entity must add a facility.

Lastly, the Commission should (1) limit the proposed directive to including a procedure for the Commission, not any "applicable governmental authority," to add a facility to an applicable entity critical facility list, and (2) clarify that the Commission's ability to use that procedures only applies to applicable entities and facilities subject to its jurisdiction. In the March 7 Order, the Commission directed NERC to include a procedure for the Commission to add or subtract a facility. In the NOPR, however, the Commission modified its language, proposing to direct NERC to include a procedure for "applicable government authorities, i.e., the Commission and any other appropriate federal or provincial authorities, to add or subtract facilities from an applicable entity's list of critical facilities"²⁶ The Commission did not elaborate on this modification or explain the phrase "other appropriate federal or provincial authorities." As NERC's Reliability Standards apply to registered entities outside of the United States and the Commission's jurisdiction, the Commission's intent may have been to ensure that the language in the proposed Reliability Standard accommodates governmental authorities outside of the United States with subject matter jurisdiction over reliability matters.²⁷

²⁶ NOPR at P 23.

²⁷ Note that Appendix 2 of the NERC Rules of Procedure defines "applicable governmental authority" as "the FERC within the United States and the appropriate governmental authority with subject matter jurisdiction over reliability in Canada and Mexico."

It would be inappropriate, however, for the Commission to direct NERC to define the right of all governmental authorities with jurisdiction over NERC's Reliability Standards. Those governmental authorities may not need or want such authority. Further, the proposed directive may be inconsistent with the laws, rules, or regulations of another jurisdiction, yet FERC is mandating that the directive be included in an international Reliability Standard. If, for instance, a Canadian governmental authority with subject matter jurisdiction over NERC's Reliability Standards seeks to modify an applicable entity's critical facility list, it should neither be subject to nor limited by a Commission mandated procedure. In order to accomplish its objective, the Canadian governmental authority must instead be able to exercise its existing authority. As such, the Commission should limit the proposed directive to including a procedure applicable solely to the Commission and not expand the directive to include any "applicable governmental authority."

NERC is also concerned that the Commission's reference to "applicable governmental authorities" could be interpreted broadly to include any U.S. governmental agency, not just the Commission. Expanding the term "applicable governmental authorities" in this manner could put applicable entities in the untenable situation of having their critical facility lists reviewed by multiple governmental authorities with varying agendas and at various points in time. Such a process could divert resources from efficient and effective implementation of the proposed Reliability Standard. Accordingly, the Commission should clarify that the proposed directive is limited to including a procedure for the Commission to add a facility, consistent with the March 7 Order, and was not intended to apply to other U.S. federal authorities. This does not mean that the Commission could not coordinate with other governmental agencies to identify critical facilities that should be included on an applicable entity's critical facility list. Rather, any formal directive to add a facility must go through the Commission in accordance with any proposed procedure.

Additionally, if the Commission were to direct NERC to include a procedure in the proposed Reliability Standard to allow other U.S. governmental authorities to add facilities, it would be an improper delegation of the Commission's authority under Section 215 of the FPA over reliability matters. Federal case law indicates that there are limits to the authority of a federal agency to delegate matters for which Congress explicitly granted the agency subject matter jurisdiction.²⁸ When a statute delegates authority to a federal officer or agency, sub-delegations to outside parties, including non-subordinate federal agencies, are assumed to be improper absent an affirmative showing of congressional authorization.²⁹ Pursuant to Section 215 of the FPA, Congress granted the Commission subject matter jurisdiction over the ERO, any regional entities, and all users, owners and operators of the bulk-power system for purposes of approving Reliability Standards and enforcing compliance with Section 215. There is no indication that Congress intended FERC to be able to delegate part or all of its duties under Section 215 of the FPA. Accordingly, directing NERC to allow U.S. governmental agencies other than the Commission to identify critical facilities for purposes of Reliability Standard CIP-014-1 would contravene federal case law with respect to delegations of agency authority.

Finally, the Commission should also clarify that it cannot use any proposed procedure to add facilities outside of its jurisdiction. The procedure must limit the Commission's ability to add facilities to entities and locations within its jurisdiction (e.g., the Commission would have no authority under the proposed Reliability Standard to direct a Canadian entity add a facility located in Canada to its critical facility list).

²⁸ *La. Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653 (3rd Cir. 2014); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-68 (2004); *Shook v. District of Columbia Fin. Responsibility & Mgmt Assistance Auth.*, 328 U.S. App. D.C. 74, 132 F.3d 775, 783-84 & n.6 (D.C. Cir. 1998); *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 237 U.S. App. D.C. 390, 737 F.2d 1095, 1143-44 & n.41 (D.C. Cir. 1984); *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18-20 (D.D.C. 1999).

²⁹ *See, e.g., United States Telecom Ass'n*, 359 F.3d at 564-68.

2. Standards for Identifying Critical Facilities – Removal of the Term “Widespread”

a. NOPR

The Commission also proposes to direct NERC to remove the term “widespread” as it appears in the proposed Reliability Standard.³⁰ The Commission notes that the language in Requirement R1 describing the facilities to be identified as critical under the proposed Reliability Standard diverges from the language in the March 7 Order with the addition of the term “widespread.” Specifically, in the March 7 Order, the Commission stated that a critical facility is:

one that, if rendered inoperable or damaged, could have a critical impact on the operation of the interconnection through instability, uncontrolled separation or cascading failures on the Bulk- Power System.³¹

Requirement R1, which addresses the directive in the March 7 Order that owners and operators of the Bulk-Power System perform a risk assessment of their systems to identify their critical facilities, requires Transmission Owners to perform risk assessments:

designed to identify the Transmission station(s) or Transmission substation(s) that if rendered inoperable or damaged could result in *widespread* instability, uncontrolled separation, or Cascading within an Interconnection (emphasis added).

In the NOPR, the Commission proposes to direct NERC to remove the term “widespread,” asserting that the inclusion of the term could (1) narrow the scope and number of identified critical facilities beyond what was contemplated in March 7 Order, and (2) because it is undefined, potentially renders the Reliability Standard unenforceable or could lead to an inadequate level of reliability by omitting facilities that are critical to the reliable operation of the Bulk-Power System.³²

³⁰ NOPR at P 27.

³¹ March 7 Order at P 6.

³² NOPR at P 28.

b. Comments

NERC does not oppose modification of the proposed Reliability Standard consistent with the proposed directive, although the modification must be developed through the NERC standards development process and consideration given as to whether alternative clarifying language can be provided to ensure the proposed Reliability Standard remains focused on Interconnection impacts and not local impacts. As discussed below, the inclusion of the term “widespread” was not intended to narrow the scope of critical facilities beyond what was contemplated by the March 7 Order. NERC understands, however, that because it is an undefined term, the inclusion of the term “widespread” may create confusion with respect to the standard or criteria entities must use for identifying critical facilities according to Requirement R1.

As discussed in the Petition, the standard drafting team understood the March 7 Order as focused on identifying and protecting the highest priority facilities on the Bulk-Power System. To help ensure that the proposed Reliability Standard was properly scoped and did not divert limited resources towards facilities that would not have a critical impact, the standard drafting team sought to include additional language in the proposed Reliability Standard. The inclusion of the term “widespread” was intended to focus applicable entities’ security efforts under the proposed Reliability Standard on facilities whose loss would have more than a local area impact and could result in the more extensive impacts contemplated in the March 7 Order.³³

³³ NERC notes that the term “Cascading” is defined in the NERC Glossary of Terms Used in Reliability as follows:

The uncontrolled successive loss of system elements triggered by an incident at any location. Cascading results in *widespread* electric service interruption that cannot be restrained from sequentially spreading beyond an area predetermined by studies (emphasis added).

As evidenced by the Commission’s statements in the NOPR,³⁴ however, it appears that the term “widespread” could be subject to varying interpretations and could potentially be interpreted to narrow the scope of the proposed Reliability Standard beyond what was contemplated in the March 7 Order. Accordingly, NERC does not oppose modification of the proposed Reliability Standard consistent with the proposed directive. Nevertheless, it remains important to ensure that the language of the proposed Reliability Standard properly focuses applicable entities’ security efforts on identifying and protecting high risk facilities. Consistent with the requirements of FPA Section 215, any Commission directive on this issue should acknowledge that while NERC, working with stakeholders through its standards development process, may decide that it is appropriate to simply remove the term “widespread” from the proposed Reliability Standard, NERC may also consider whether to include any alternative, more precise language in Reliability Standard CIP-014-1 to help ensure entities properly focus their security efforts.

3. Protection of “High Impact” Control Centers

a. NOPR

As mentioned above, the Commission proposes “to direct NERC to make an informational filing within six months of the effective date of a final rule in this proceeding indicating whether the development of Reliability Standards that provide physical security for all ‘High Impact’ control centers, as that term is defined in Reliability Standard CIP-002-5.1, is necessary for the reliable operation of the Bulk-Power System.”³⁵ The NOPR provides that the proposed informational filing should address “whether there is a need for consistent treatment of ‘High

³⁴ NOPR at P 28.

³⁵ *Id.* at P 35.

Impact’ control centers for cybersecurity and physical security purposes through the development of Reliability Standards that afford physical protection to all ‘High Impact’ control centers.”³⁶

b. Comments

NERC does not object to further examining whether all “High Impact” control centers warrant assessment and physical security controls under the proposed Reliability Standard and making an informational filing to the Commission addressing this issue. However, the Petition explains NERC’s and the standard drafting team’s reasoning for applying the proposed Reliability Standard to primary control centers that operationally control any critical Transmission stations or Transmission substations instead of all “High Impact” control centers.³⁷ If, after further considering the explanation in the Petition and any stakeholder comments on this issue, the Commission continues to maintain that additional information is necessary, NERC will further examine whether all “High Impact” control centers warrant assessment and physical security controls under the proposed Reliability Standard and make an informational filing to the Commission addressing this issue.

NERC respectfully requests, however, that the Commission provide NERC at least 12 months from the effective date of a final rule in this proceeding to submit the informational filing. As provided in the Implementation Plan, the proposed Reliability Standard would only become effective six months after the effective date of a final rule. Providing at least a 12-month period for this informational filing will thus provide NERC an opportunity to monitor and assess applicable entities’ implementation of the proposed Reliability Standard and begin to better understand the nature of the control centers identified under the proposed Reliability Standard, the

³⁶ NOPR at P 39.

³⁷ Petition at 19-22.

types of threats to those controls centers, and the security or resiliency measures entities will use to protect those control centers from physical attacks. This information may be useful in analyzing the question posed by the Commission in the NOPR. Moreover, a minimum of 12-months will provide NERC the necessary time to coordinate with its stakeholders, through technical conferences or otherwise, to gather any additional facts, and analyze whether the reasoning for the applicability of the proposed Reliability Standard should be revisited through the Reliability Standards development process.

4. Applicability to Generator Owners and Generator Operators

a. NOPR

The Commission proposes to approve the applicability section of the proposed Reliability Standard without the inclusion of Generator Owners and Generator Operators, stating that omitting Generator Owners and Generator Operators from the applicability section is consistent with the March 7 Order.³⁸

b. Comments

NERC supports the Commission's proposal to approve the applicability section of the proposed Reliability Standard without the inclusion of Generator Owners and Generator Operators. Consistent with the March 7 Order, proposed Reliability Standard CIP-014-1 is designed to focus industry resources on protecting the highest priority facilities on the Bulk-Power System. As explained in the Petition, while Generator Owners and Generation Operators, like other functional entities, should take steps to protect their facilities from physical attack, the loss of such facilities is highly unlikely to result in the critical impacts the Commission contemplated

³⁸ NOPR at PP 44-45.

in the March 7 Order and which the proposed Reliability Standard is designed to guard against.³⁹ Generation facilities (e.g., a generator or a generation substation) do not have the same critical functionality as certain Transmission stations and Transmission substations due to the limited size of generating plants, the availability of other generation capacity connected to the grid, and planned resilience of the transmission system to react to the loss of a generation facility. As the Commission stated in the NOPR, “it is reasonable to focus attention on the most critical facilities in order to provide the most effective use of resources while adequately addressing the identified reliability gap.”⁴⁰

5. Third-Party Recommendations

a. NOPR

The Commission proposes to approve NERC’s proposal regarding the third-party verification and review in Requirements R2 and R6 of the proposed Reliability Standard.⁴¹ The Commission stated that, with the understanding that “failure to provide a written, technically justifiable reason for rejecting a third-party recommendation would render the applicable entity non-compliant,” NERC’s proposal is “an equally efficient and effective alternative to the directive in the March 7 Order.”⁴²

b. Comments

NERC supports the Commission’s proposal to approve the third-party verification and review methods required by Requirements R2 and R6 of the proposed Reliability Standard. As explained in the Petition, the third-party verification and review provisions will add an additional

³⁹ Petition at 22-24.

⁴⁰ NOPR at P 44.

⁴¹ *Id.* at P 50.

⁴² *Id.*

layer of expertise and independence to the identification of critical assets, the evaluation of threats and vulnerabilities, and the development of effective security plans that provide for the proper combination of security and resiliency measures.⁴³ Ultimately, NERC expects that the third-party verifications and reviews will play an important role in ensuring a meaningful and successful implementation of these core security requirements.

NERC and the standard drafting team recognized that an applicable entity may be in the best position to determine (1) which of its facilities are critical to its system and neighboring systems, and (2) the types of security and resiliency measures to apply given its budget, resource or other organizational needs. Accordingly, the third-party verification and review requirements are structured to obtain the benefit of a third-party's expertise and independent judgment without necessarily supplanting the expertise and judgment of the applicable entity. Requiring documentation of the reasons for not following a third-party's recommendation will help ensure that applicable entities meaningfully consider the third-party's recommendations and follow those recommendations unless it can justify its reasons for not doing so. As stated in the Petition, during their compliance monitoring activities, NERC and the Regional Entities will focus on whether an entity has the necessary documentation to justify instances in which it decided not to follow a third-party's recommendation.⁴⁴ If the entity fails to provide a reasonable explanation for its decision, NERC and the Regional Entity will find that the entity has not complied with the applicable requirement.

⁴³ Petition at 34-38, 47-50.

⁴⁴ *Id.* at 36-37, 49-50.

6. Resiliency

a. NOPR

In the NOPR, the Commission notes that while the proposed Reliability Standard does not require applicable entities to implement specific resiliency measures, it is consistent with the March 7 Order insofar as it allows applicable entities to implement resiliency measures along with those security measures deemed necessary “to meet different threats and protect varying Bulk-Power System configurations.”⁴⁵ The Commission stated, however, that “[r]esiliency is as, or even more, important than physical security given that physical security cannot protect against all possible attacks.”

Following its discussion of the importance of resiliency, the Commission proposes – based on NERC’s commitment to monitor and assess implementation of the proposed Reliability Standard and make such information available to Commission staff – to rely on NERC’s ongoing assessment and require NERC to make such information available to Commission staff upon request. In addition, the Commission proposes to direct NERC to submit an informational filing, within one year of the effective date of the final rule in this proceeding, “that addresses the resiliency of the Bulk-Power System when confronted with the loss of critical facilities.”⁴⁶ The Commission stated that the informational filing “should explore what steps can be taken, in addition to those required by the proposed Reliability Standard, to maintain the reliable operation of the Bulk-Power System when faced with the loss or degradation of critical facilities.”⁴⁷

⁴⁵ NOPR at P 54. Requirement R5 of the proposed Reliability Standard requires entities to develop and implement security plans that, among other things, include “[re]siliency or security measures designed collectively to deter, detect, delay, assess, communicate, and respond to potential physical threats and vulnerabilities identified during the evaluation conducted in Requirement R4.”

⁴⁶ NOPR at P 57.

⁴⁷ *Id.*

b. Comments

As discussed below, while NERC will provide Commission reports on the implementation of the proposed Reliability Standard, NERC respectfully requests that the Commission not direct NERC to submit a separate information filing at this time addressing the resiliency of the Bulk-Power System when confronted with the loss of critical facilities. NERC strongly concurs with the Commission's assessment of the importance of resiliency in "minimiz[ing] the impact of the loss of facilities and restor[ing] blacked-out portions of the Bulk-Power System as quickly as possible."⁴⁸ Resiliency measures will ultimately make it more difficult for the perpetrator of a physical attack to cause significant harm to the Bulk-Power System. For instance, as discussed in the petition, modifications to system topology or the construction of new facility could lessen the criticality of a particular facility and minimize the reliability impact of a successful physical attack on that facility.⁴⁹ Similarly, access to spare equipment could limit the length of an outage caused by a successful physical attack. To that end, as discussed in the Petition, the proposed Reliability Standard was designed to help provide for a more resilient Bulk-Power System.⁵⁰ As the Commission noted, applicable entities may implement resiliency measures rather than, or in addition to, security measures, such as by adding facilities or operating procedures that reduce or eliminate the importance of existing critical facilities.⁵¹

Nevertheless, it is important at this time to provide applicable entities the flexibility to develop and implement security plans that consist of whatever combination of resiliency and security measures are necessary to protect their critical facilities from, and minimize the impact

⁴⁸ NOPR at P 55.

⁴⁹ Petition at 42-43.

⁵⁰ *Id.*

⁵¹ NOPR at P 55.

of, any physical attack. As NERC monitors and assess implementation of the proposed Reliability Standard, however, it will analyze the types and efficacy of the security and resiliency measures included in the various security plans to determine whether any improvements to the proposed Reliability Standard are necessary to help ensure that entities are implementing an effective combination of security and resiliency measures to both protect against physical attacks and limit the impact of any successful physical attack.

NERC reaffirms its commitment to monitor and assess implementation of the proposed Reliability Standard and provide reports to the Commission. As described in the petition, in approving proposed Reliability Standard CIP-014-1, the NERC Board of Trustees (the “NERC Board”) instructed NERC management to monitor and assess the implementation of the proposed Reliability Standard and provide regular updates to the NERC Board to measure the effectiveness of industry’s implementation of the proposed Reliability Standard.⁵² The NERC Board’s ultimate objective is for NERC to better understand the variety of ways entities are implementing the proposed Reliability Standard and analyze whether the proposed Reliability Standard is having its intended effect (i.e., enhancing the physical security, resiliency and reliability of the Bulk-Power System) or whether improvement to the Reliability Standard are necessary.

NERC staff expects to provide the NERC Board two initial reports.⁵³ First, approximately three months after applicable entities’ implementation of Requirements R1, R2 and R3 (i.e., completion of the initial critical facility identification), NERC staff anticipates that it will provide a report to the NERC Board addressing the scope of facilities identified as critical under the

⁵² Petition at 14-15.

⁵³ As stated in the petition, NERC staff will assess and monitor implementation in a manner that protects against the public disclosure of any sensitive or confidential information by, among other things, collecting and presenting aggregated information that cannot be attributed to any particular entity or transmission system. Any public reports assessing implementation will ensure that no sensitive or confidential information is released.

proposed Reliability Standard, including, among other things, the number of facilities identified as critical and the defining characteristics of such facilities.

In addition, approximately three months after applicable entities' implementation of Requirements R4, R5 and R6, NERC staff anticipates that it will provide a second report to the NERC Board addressing entities' evaluation of threats and vulnerabilities and the development of security plans. Among other things, the second report may address the nature and characteristics of the Requirement R4 evaluations, the scope of security plans (i.e., the types of security and resiliency measures included under the various security plans), the timelines included in the security plans for implementing the security and resiliency measures, and industry's progress in implementing those security and resiliency measures. Given the NOPR's discussion of resiliency, this report will pay particular attention to the resiliency measures included in entities' security plans. NERC commits to providing both of these reports to Commission staff.

NERC also agrees with the Commission that it is important to continue exploring what steps, in addition to those required by the proposed Reliability Standard, are necessary to increase resiliency and maintain the reliable operation of the Bulk-Power System when faced with the loss or degradation of critical facilities. NERC notes, however, that there is an abundance of available studies on resiliency of the grid and the objectives of the proposed informational filing are unclear. Furthermore, NERC is currently collaborating with the Commission's Office of Electric Reliability ("OER") to study the electric utility industry's Bulk-Power System recovery and restoration planning activities as well as verifying the efficacy of NERC's Reliability Standards in supporting those activities. This collaborative assessment is an important step in gauging the resiliency of the Bulk-Power System and the electric utility industry's level of preparation for efficiently and effectively recovering from the loss of a critical facility.

Given this collaborative project and NERC's commitment to monitor, assess, and report on implementation of the proposed Reliability Standard, NERC requests that the Commission refrain, at this time, from directing NERC to submit a separate informational filing, within one year of the effective date of the final rule in this proceeding, addressing the resiliency of the Bulk-Power System. It is important that NERC focus its resources at this time on the implementation of Reliability Standard CIP-014-1 and reporting on the effectiveness of the implementation rather than duplicating efforts on examining grid resiliency. NERC must devote a significant amount of time and effort establishing an effective compliance monitoring program for the proposed Reliability Standard, which is a unique and highly important Reliability Standard.

Given the importance of this topic, it is important to first gather and analyze information about what steps entities are taking under the proposed Reliability Standard and other Reliability Standards (e.g., Reliability Standards EOP-005-2, CIP-008-3, and CIP-009-3), as well as additional measures entities have implemented outside of their compliance obligations associated with mandatory Reliability Standards. Following its collaborative assessment with OER and after monitoring and assessing implementation of the proposed Reliability Standard, NERC and Commission staff will have a more comprehensive understanding of what additional measures entities can take to improve resiliency, if any, and how NERC can use its various reliability tools, including mandatory Reliability Standards, to help maintain reliable operation of the Bulk-Power System following the loss of degradation of critical facilities.

Directing NERC to submit a separate informational filing addressing such a broad topic at this time is premature and unlikely to provide the comprehensive and focused analysis that is required to have a meaningful impact. NERC respectfully requests that any informational filings required by the final rule have a clear objective tailored to better understanding the scope and/or

effectiveness of the proposed Reliability Standard. For other, more broadly applicable issues like resiliency, the Commission could, as an alternative, initiate a separate proceeding to address such issues, and, as necessary, schedule one or more technical conferences to discuss the issue with a wide group of stakeholders.

III. CONCLUSION

For the reasons stated above, NERC respectfully requests that the Commission approve the proposed Reliability Standards and consider NERC's comments when it issues its final rule in this proceeding.

Respectfully submitted,

/s/ Shamai Elstein

Charles A. Berardesco

Senior Vice President and General Counsel

Holly A. Hawkins

Associate General Counsel

Shamai Elstein

Counsel

North American Electric Reliability Corporation

1325 G Street, N.W., Suite 600

Washington, D.C. 20005

202-400-3000

charlie.berardesco@nerc.net

holly.hawkins@nerc.net

shamai.elstein@nerc.net

*Counsel for North American Electric Reliability
Corporation*

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